While recommending either or all those volumes, we do not suppose the American student is to pursue the study of the Roman law into its specialities and details. It would be difficult to persuade him to do this, even if he had time. Most of our students, moreover, have not time for this, if they had inclination. But if one of these wishes to go beyond the scope of the mechanical details of his profession, and to ascend into the purer and clearer atmosphere of jurisprudence as a liberal science, he cannot do it more readily or effectually than by drawing inspiration from that immortal system of which it has been eloquently said: "As if the mighty destinies of Rome were not fulfilled, she reigns throughout the whole earth by her reason, after having ceased to reign by her authority."

EMORY WASHBURN.

Cambridge.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

JOHNSON v. GORHAM.

Assertion of title by the possessor of land is an important circumstance indicating adverse possession and ouster of the real owner, and the absence of such assertion may be an important circumstance indicating that the possession is not adverse. But the question of ouster must depend upon all the circumstances of the case, and it is not essential that the possessor should hold the land claiming it as his own. Such claim of ownership is not, as matter of law, an indispensable element of adverse possession.

In trespass *qu. cl.*, the declaration alleged that the defendant broke and entered into the plaintiff's land, and trod down and destroyed the herbage, and cut down the trees, and dug up the ground, to the plaintiff's damage. The plaintiff introduced evidence to prove that the defendant not only cut down the trees, but *removed* the wood; and the court charged the jury, that in estimating damages they might take into consideration the cutting and *removal* of the wood, if the trespass was one continued act. Held, that the evidence was inadmissible, and the charge erroneous.

TRESPASS *qu. cl. fregit;* appealed from the judgment of a justice of the peace to the Superior Court, and tried on the general issue closed to the jury, with notice of title in the defendant by adverse possession. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial for error in the rulings and charge of the court.

The points assigned as error sufficiently appear in the opinion of the court.

C. Ives and *Alling* for the motion.

Doolittle, contrà.

SEYMOUR, J.—This is an action of trespass *quare clausum*, in which the plaintiff avers that the defendant with force and arms broke and entered into and upon the plaintiff's land, and trod down and destroyed the herbage then and there growing, and *cut down the trees*, and dug up the ground, to the plaintiff's damage.

Under this declaration the plaintiff was permitted, against the defendant's objection, to prove that the defendant not only cut down the trees, *but removed the wood*, and the jury were instructed that in estimating damages they might take into consideration the cutting and *removal* of the wood, if the trespass was one continued act. It is conceded that the cutting the trees and carrying away the wood may be parts of one continued act, and if they are so, the plaintiff may so treat them, and recover for the entire act in one count, provided the count be with proper averments adapted to the case. The cutting, however, may be wholly unconnected with the carrying away of the trees cut, and then, by strict rule, there should be two counts for the two acts, one for the cutting, and another for the carrying away. But where the plaintiff claims damages in his declaration for the cutting only, the defendant cannot be required to come to trial prepared to meet evidence of damage done by removal. The office of the declaration is to apprise the defendant fairly and fully of the plaintiff's claims; and the cutting of the trees does not involve their removal. The mere cutting may be a slight injury to the owner, and sometimes might be a benefit. The carrying them away and converting them to the defendant's use, is quite a distinct thing.

For this cause there must be a new trial.

The charge of the judge in regard to adverse possession was probably correct in reference to the circumstances of the case before him, but abstractly considered is liable to objection, and would be quite incorrect in reference to cases that have occurred, and may again occur. The charge is as follows: "A person to acquire a title by possession, must have the actual use and posses-

sion of the land. It is essential that the possession should be adverse to the right of the owner, and that the possessor should hold the land *claiming it as his own*, and denying the right of everybody else."

In the case of *Huntington* v. *Whaley*, 29 Conn. 398, Judge SANFORD, giving the opinion of the court, says: "The only legitimate inquiry for the jury was, whether the defendant, and those under whom he claimed, had for the period of fifteen years had the actual, open, adverse occupancy and possession of the controverted property, *claiming it as their own*, and actually excluding all other persons from the possession." As applied to the facts in the case of *Huntington* v. *Whaley* this language is not open to objection; but as an absolute proposition of law, and as a complete definition of adverse possession applicable to all cases, the charge of the judge below, and the language quoted from Judge SANFORD'S opinion in *Huntington* v. *Whaley*, require explanation and qualification.

In the case of *French* v. *Pearce*, 8 Conn. 442, Judge HOSMER, in speaking approvingly of the case of *Bryan* v. *Atwater*, 5 Day 181, says, "the first principle asserted in that case is, that to render a possession adverse it is *not* necessary that it should be accompanied *with a claim of title*, and with the denial of the opposing title." Now although the language of Judge SANFORD, in *Huntington* v. *Whaley*, is in direct contradiction to the language of Judge HOSMER, in *French* v. *Pearce*, it was not Judge SANFORD'S intention to question the soundness of Judge HOSMER'S views. Judge SANFORD did not undertake to give a complete definition of adverse possession as applicable to all cases; he intended merely to say that, situated as the defendant was in the case of *Huntingdon* v. *Whaley*, the legitimate inquiry for the jury was whether the defendant had possession of the controverted property, *claiming it as his own*. From what appears of the facts in the case now under our consideration, the absence of a claim of ownership on the part of the defendant would appear to be a very decisive circumstance to show that the possession was not adverse. but it is clear that such claim of ownership is not, as matter of law, an indispensable element of adverse possession. A party in possession of land under a defective deed may openly admit that the legal title remains in the grantor, and admit that his own ownership is therefore imperfect, and yet his possession may be

adverse. The right of the owner of real estate is barred, if he suffer himself to be ousted of possession for fifteen years, and the true inquiry in these cases is whether the owner is ousted.

Judge INGERSOLL, in *Bryan* v. *Atwater*, places the subject in its true light, when he says: "To make a disseisin it is *not* necessary that the disseisor *should claim title* to the lands taken by him. It is not necessary that he should disclaim or deny the title of the legal proprietor. It is necessary only that he should enter into and take possession of the lands as if they were his own. * * * If property be so taken and so used by any one, *though he claims no title*, but avers himself to be a wrongdoer, yet by such act the legal proprietor is disseised."

The result of the cases is, that assertion of title by the possessor is an important circumstance indicating adverse possession and ouster of the real owner, and the absence of such assertion may be an important circumstance, and often very important, as indicating that the possession is not adverse; yet the question of ouster is one that must depend upon all the circumstances of the case, and it is not therefore strictly true, as stated in the charge under consideration, that it is essential that the possessor should hold the land *claiming it as his own*, and *denying the right of everybody else.*

In the instance given above of the occupant under a defective deed, there is indeed a sense in which he may be said to claim the land as his own. He may properly assert his equitable title, as being superior to the legal title which he admits to be in his grantor. But whether he asserts such claim or not makes no difference with his rights. The mere fact of possession under a defective deed would, in general, indicate that the possession was adverse. In the case put by Judge INGERSOLL in *Bryan* v. *Atwater*, where the party in possession avows himself to be a wrongdoer, the true owner would be disseised, and the possession would be adverse, and in such a case there is clearly no claim of title by the possessor in any sense of the term.

New trial advised.

In this opinion the other judges concurred; except BUTLER, C. J., who did not sit.

The proposition maintained in the foregoing opinion, in regard to adverse possession not necessarily implying a claim of title in the disseisor, is no doubt abstractly sound, and, as explained by the learned judge, is not calculated to

mislead or give any false impression. But practically it is of a misleading character, as it seems to us, tending to the impression that one in the possession and use of land, for the term of the statute of limitations in regard to rights of entry, may acquire title, while all the time acknowledging the title of the former possessor; which is not true, as a general rule, but the contrary. We do not expect as a general thing that men will go about the country dispossessing others of their lands in mere wantonness and with no claim of right on their part. This may occur in some portions of the country, where the only efficient government is that of a vigilance committee, and the population is largely made up of what are technically denominated roughs. And where such cases occur, no doubt, the transaction would well deserve the name of a disseisin, and the possession become sufficiently adverse. But this can scarcely be regarded as a normal state of things, or one to be provided for by the administrators of the law. Text writers and judges more commonly prepare their definitions with reference to the ordinary mode of transacting similar affairs in civilized life. Hence Mr. Angell defines adverse possession in these words: "It is the occupation with an *intent* to claim against the true owner." § 390, Angell on Limitations. Under the feudal tenures there seems to have been great uncertainty as to what constituted a disseisin of the tenant: *Taylor dem. Atkyns* v. *Horde*, 1 Burr. 60. Lord MANSFIELD, C. J., here says: "Disseisin must mean some way or other turning the tenant out of his tenure and *usurping* his place and feudal relation." The remedy by *assize of novel disseisin* was invented in order to afford a clear and more perfect remedy to the party disseised, which, as Lord MANSFIELD here says, "was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements and hereditaments." This created a species of nominal disseisin, or disseisin at the election of the owner, which has not much obtained in the New England States—certainly not in Connecticut and Vermont—and of which we now hear very little in the American cases.

Our cases go mainly upon an actual ouster or disseisin and a continued adverse possession for the term of the statute of limitations, which begins to run from the disseisin.

The prescription of the civil law was based upon an adverse possession, which must be *neque clam, neque precario, neque vi.* But these requirements have not in all respects been so strictly applied in American courts as would seem to be required by some of the civil law writers. For it really makes no essential difference here that the party claiming title by adverse possession obtained such possession by force and violence. If it were so obtained as to give the former possessor a right of action, and has been so long maintained as to bar that right of action, the title of the former occupier is none the less lost even if he were the real owner. But the cases all assume that the party thus claiming title must have entered and possessed the land, claiming to be the owner in fee, or at least by some title independent of the person upon whom he made his entry. THOMPSON, Justice, in *Jackson* v. *Porter*, 1 Paine C. C. 457, says: "It is not possession alone, but that it is accompanied with the claim of the fee, which by construction of law is deemed *primâ facie* evidence of such an estate." And the learned author of the Treatise on Limitations, already referred to, in summing up the cases, adds, "Indeed that it is the *intention* to claim title which makes the possession of the holder of the land adverse, is the doctrine upon which the decision in every case proceeds. If it be clear that there is no such intention, there can be no pretense of an adverse possession." But we can conceive that one may enter into possession of land, which

he knows belongs to another, with the express purpose of acquiring title by adverse possession, and that he may all the time during the period requisite to acquire title by adverse possession, be ready to admit that the title to the land is not in him, but in another, and that he is maintaining an adverse possession with the view of acquiring the title. In such a case we are not prepared to say the possession is not adverse, and that it will not transfer the title after the proper period has elapsed. But it scarcely comes within the definition of the civil law, *neque precario*.

And when one contracts for the purchase of land and pays the whole price, and enters into the possession without a conveyance, his possession will be adverse to that of the former owner, and the title be transferred to him after the lapse of the period of the statute of limitations, although he may during all the time be ready to admit that the title is still in his vendor. *Brown* v. *King*, 5 Met. (Mass.) 173; *Ellison* v. *Cathcart*, 1 McMullan (S. C.) 5. But, upon general principles, neither a vendee or *quasi* trustee of any kind can set up an adverse claim of title to the land, so long as he recognises the contract by which he entered into possession. *Brown* v. *King*, supra; *Woods* v. *Dille*, 11 Ohio 455. But some of the cases deny that one can acquire title to land by possession under a contract for purchase, even when it is fully performed. *Elles* v. *Day*, 4 Conn. 95. But the reason and principle seem in favor of the Massachusetts rule in this respect. And it seems very justly to have been held in a later case in Massachusetts, *Sumner* v. *Stevens*, 6 Met. 337, that where one enters into possession of land under a parol gift, the possession will be held adverse and title will be acquired under the statute. Ch. J. SHAW here says, that although a grant, gift or sale of land by parol, is void under the statute of frauds, yet when accompanied by an actual entry into possession, it manifests the intent of the donee to enter in his own right, and not as tenant, and there is an implied admission on the part of the donor that the entry is so made. And the same rule would apply if the entry were made by the grantee under a deed defectively executed, so as not to pass the title; the possession would confirm the title.

We conclude, therefore, that although it is possible to have an adverse possession of land, by a party acting in good faith and not with any view to obtain the land unjustly, short of claiming to be the owner of the land at the time of the entry, there must always exist a continued claim to hold the possession against the right, title or claim of the former owner or possessor; indeed to constitute an adverse possession which will ripen into title in the possessor, it must be accompanied with a claim either express or implied, to hold the possession against all the world, and in the right of the party thus in possession. We admit that, abstractly speaking, it may be the right of superior force, *ultima ratio regum;* but the possession, in order to be of such an adverse character as to ripen into title under the statute of limitations, must be under a claim of right of some kind in the possessor, at least to maintain the possession against all others. I. F. R.